

# LGBT RIGHTS AND THE ADMINISTRATIVE STATE

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*Normally we don't think of administrative agencies as policing constitutional equality norms. There's a good reason for this—courts are often thought of as the “ultimate expositor” of constitutional meaning, while agencies are thought of as undertaking not constitutional interpretation, but statutory implementation. But recently scholars have explored the ways in which constitutionalism enters agency decisionmaking—commonly referred to as “administrative constitutionalism.” Administrative constitutionalism theories loosen the assumption that courts have a monopoly on constitutional understanding, and instead recognize agencies as constitutional actors in their own right. This Note explores how agencies have engaged in administrative constitutionalism to police LGBT equality rights—often in ways that differ markedly from judicial applications of equal protection. It then offers a defense of these practices, arguing that agencies have acted in the face of widespread underenforcement of equality norms by the judiciary owing largely to institutional considerations that—justified or not—have no bearing on the meaning of equal protection.*

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## INTRODUCTION

Jane Doe wanted to serve again.

A veteran, Doe had first enlisted in the military when she was only eighteen years old.<sup>1</sup> She spent the next eight and a half years in the Air Force before returning to civilian life.<sup>2</sup> But nearly a decade after her discharge, she once more felt the call to serve. It was 1976—the nation’s Bicentennial—and Doe decided to apply for a commission as an officer in the Army Reserve.<sup>3</sup>

Doe should not have been a long shot. Not only was she a veteran with a lengthy record of service, but she also possessed specialized skills in cryptography and languages.<sup>4</sup> Indeed, because of these special skills, she was eligible for a special commission as a Captain.<sup>5</sup>

But Jane Doe did not receive a special commission. Or any commission, for that matter. In fact, Jane Doe’s application was rejected outright, and she was categorically barred from all Army service.<sup>6</sup> You see, at some point after her Air Force service—but before she applied to the Army—Doe, who was designated male at birth, underwent sex reassignment surgery.<sup>7</sup> And that fact categorically barred her from service under an Army regulation which stated that “major abnormalities and defects of the genitalia such as change of sex” were a disqualifying medical defect.<sup>8</sup>

Doe sued under § 1983 to enjoin the regulation.<sup>9</sup> But the District Court for the District of Minnesota dismissed Doe’s claim as nonjusti-

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<sup>1</sup> See *Doe v. Alexander*, 510 F. Supp. 900, 902 (D. Minn. 1981).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *id.* at 903.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* at 902.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* (citing U.S. DEP’T OF THE ARMY, ARMY REGULATION 40-501, STANDARDS OF MEDICAL FITNESS 2-14 (1974)).

<sup>9</sup> See *id.* 42 U.S.C. § 1983 provides a civil cause of action for individuals deprived of constitutional rights by persons acting under color of law. See 42 U.S.C. § 1983 (2012).

ciable, and stated that even if it were to reach the merits, the regulation would be upheld under rational basis review.<sup>10</sup>

Forty years after Doe was denied admission as an officer in the Army Reserve, the military ended its policy of excluding transgender service members from serving openly.<sup>11</sup> But the change did not come at the behest of a federal court. Rather, the change came from within the Pentagon itself, in the form of new Department of Defense directives.<sup>12</sup> Indeed, Secretary of Defense Ash Carter announced the policy change on June 30, 2016, appealing to the principle “[e]mbedded within our Constitution . . . that all Americans are free and equal.”<sup>13</sup>

Normally we don’t think of administrative agencies as policing constitutional equality norms.<sup>14</sup> Or, if we do, we think of those agencies that are tasked with fighting discrimination—like the Equal Employment Opportunity Commission or the Department of Justice.<sup>15</sup> There’s a good reason for this: Courts are often thought of as the “ultimate expositor” of constitutional meaning,<sup>16</sup> while agencies are thought of as undertaking not constitutional interpretation, but statutory implementation.<sup>17</sup> But recently scholars have explored the

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<sup>10</sup> See *Alexander*, 510 F. Supp. at 905.

<sup>11</sup> See Ash Carter, U.S. Sec’y of Def., Dep’t of Def., Press Briefing by Secretary Carter on Transgender Service Policies in the Pentagon Briefing Room (June 30, 2016) [hereinafter Carter, Press Briefing], <https://www.defense.gov/News/Transcripts/Transcript-View/Article/822347/departments-of-defense-press-briefing-by-secretary-carter-on-transgender-service/> (announcing change in Army policy to allow transgender service members to openly serve). But see Trump, *infra* notes 277–78 (announcing that the U.S. government will no longer allow transgender individuals to openly serve).

<sup>12</sup> See Memorandum from Ash Carter, U.S. Sec’y of Def., Dep’t of Def., to Sec’y of the Military Dep’ts (June 30, 2016), [https://www.defense.gov/Portals/1/features/2016/0616\\_policy/DTM-16-005.pdf](https://www.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf) (establishing policies and procedures to allow transgender service members to openly serve in the military).

<sup>13</sup> See Carter, Press Briefing, *supra* note 11.

<sup>14</sup> See Bertrall L. Ross II, *Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism*, 2014 U. CHI. LEGAL F. 223, 287 (“The message the Court sends with these choices is that courts and not agencies represent the proper forum for public contestation and deliberation over constitutional values.”).

<sup>15</sup> As I discuss below, some agencies are tasked with enforcing anti-discrimination statutes that advance constitutional equality norms—what is sometimes referred to as “small C” constitutionalism. See *infra* notes 146–49 and accompanying text.

<sup>16</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (“No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.”); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1084 (2010) (“Whatever the original understanding, over time *Marbury v. Madison* has come to stand for the proposition that the federal judicial branch is the ultimate expositor of constitutional meaning in properly justiciable cases that do not present ‘political questions.’”) (footnote omitted).

<sup>17</sup> See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 1 (2d ed. 2001) (“Administrative law pertains to those agencies of government assigned the task of implementing various social, economic, and quality of life programs within our nation.”);

ways in which constitutionalism enters agency decisionmaking—commonly referred to as administrative constitutionalism.<sup>18</sup>

Agencies engage the Constitution in a multitude of ways. Sometimes an agency's engagement is direct—for example, an agency tailoring its implementation of a statute to comport with its own view of equal protection.<sup>19</sup> Sometimes it is indirect, like an agency's decision to aggressively enforce a civil rights statute embodying constitutional values.<sup>20</sup> Regardless of the form, theories of administrative constitutionalism loosen the assumption that courts have a monopoly on constitutional understanding,<sup>21</sup> and instead recognize agencies as constitutional actors in their own right.

This Note is about equal protection. But it's about a form of equal protection that goes beyond suspect classes and tiers of scrutiny and narrow tailoring—and courts entirely for that matter. What I am interested in is how the equality rights of LGBT individuals are policed by actors within the administrative state—often in ways far more robust than by the courts. And I am interested in figuring out what, if anything, can justify it. Towards that end, Part I surveys the case law and concludes that many jurisdictions systematically underenforce the equal protection rights of LGBT plaintiffs. Part II explains how agencies have filled the void, policing equal protection rights in the LGBT rights context in ways more robust than the judiciary. Part III offers a defense of administrative constitutionalism, arguing that agencies are justified in their robust enforcement of equal protection to the extent that such norms are systematically underenforced in the

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Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 Nw. U. L. REV. 871, 873 (2015) (“From the beginning of the Republic, with increasing energy in the last eighty years, Congress has been enacting statutes that vest administrative officials with the power to make laws governing many aspects of our national life.”).

<sup>18</sup> See, e.g., Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010) (“Smith’s speech, as well as administrators’ many statements favoring or opposing equal employment rulemaking, demonstrates an unexamined aspect of constitutional governance and administrative lawmaking that I call administrative constitutionalism: regulatory agencies’ interpretation and implementation of constitutional law.”); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1897 (2013) (defining administrative constitutionalism as “actions by . . . agencies to interpret and implement the U.S. Constitution”).

<sup>19</sup> See, e.g., Lee, *supra* note 18, at 800–01.

<sup>20</sup> For an example of aggressive enforcement of civil rights statutes embodying constitutional values, see WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 30–32 (2010) (discussing the decision by EEOC administrators in the 1970s to issue guidelines stating that discrimination against pregnant women was sex discrimination and thus illegal under Title VII).

<sup>21</sup> See *supra* note 16 (describing the traditional understanding that courts are the sole expositors of constitutional meaning).

judicial and legislative branches. Part III further argues that regulatory rollbacks in the wake of a changing presidential administration do not obviate the advantages of agency action as a tool for protecting LGBT rights.

## I

### UNEQUAL PROTECTION

The Supreme Court has said that “constitutional rights are to be enforced through the courts.”<sup>22</sup> But have courts been up to the task? This is the threshold question I seek to address in this Part. First, I explain the analytical framework used to adjudicate claims under the Equal Protection Clause of the Fourteenth Amendment, which is often at the heart of LGBT discrimination cases. Then I survey the Supreme Court’s sexual orientation jurisprudence and conclude that the lack of clarity in the case law has resulted in disarray and confusion in the lower courts—and unequal protection for LGBT plaintiffs.

#### A. *The Equal Protection Framework*

The Equal Protection Clause provides that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>23</sup> But this does not guarantee equal treatment in every sense. Lawmakers, as a practical necessity, must sometimes classify people in ways that disadvantage certain groups.<sup>24</sup> This in itself does not necessarily violate equal protection. “If every legislative distinction received active scrutiny from a court,” Kenji Yoshino explains, “then the courts would indeed sit as countermajoritarian ‘superlegislatures.’”<sup>25</sup> Accordingly, the Supreme Court has held that the Fourteenth Amendment “permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others.”<sup>26</sup> Government classifications are generally upheld if they bear a rational relationship to a legitimate governmental interest.<sup>27</sup> This “rational-basis” standard is highly deferential—government classifications are “accorded a strong presumption of validity.”<sup>28</sup> The chal-

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<sup>22</sup> *Davis v. Passman*, 442 U.S. 228, 242 (1979).

<sup>23</sup> U.S. CONST. amend. XIV, § 1.

<sup>24</sup> See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (stating that equal protection “must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons”).

<sup>25</sup> Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759 (2011).

<sup>26</sup> *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

<sup>27</sup> See *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973) (stating that classifications are sustained if they are “rationally related to a legitimate governmental interest”).

<sup>28</sup> *Heller v. Doe*, 509 U.S. 312, 319 (1993).

lenger must negate “every conceivable basis” that might support a classification,<sup>29</sup> even if such a basis is hypothetical or purely a post-hoc rationalization.<sup>30</sup> Moreover, courts are not to scrutinize the connection between the ends and means of the legislation: “A statutory classification fails rational-basis review only when it ‘rests on grounds wholly irrelevant to the achievement of the State’s objective.’”<sup>31</sup>

But certain special classifications receive greater judicial scrutiny. The Court has observed that prejudice against “discrete and insular minorities” might “curtail the operation of those political processes ordinarily to be relied upon to protect minorities,” necessitating a “more searching judicial inquiry.”<sup>32</sup> Thus, race-based classifications are deemed “suspect” and are only upheld when they are “narrowly tailored” to serve a “compelling governmental interest.”<sup>33</sup> Similarly, classifications based on sex will be upheld only if they are “substantially related” to an “important” governmental interest.<sup>34</sup>

The Court has not set out a singular standard for determining whether a classification is suspect.<sup>35</sup> But in the past the Court has considered factors such as whether the targeted group is “discrete and insular,”<sup>36</sup> whether it is “a minority or politically powerless,”<sup>37</sup> whether it has suffered a “history of purposeful unequal treatment,”<sup>38</sup> whether the group’s defining trait is “immutable,”<sup>39</sup> and whether such trait “bears [a] relation to [one’s] ability to perform or contribute to

<sup>29</sup> *Id.* at 320.

<sup>30</sup> See *Nguyen v. INS*, 533 U.S. 53, 75 (2001) (“Under rational basis review . . . it is ‘constitutionally irrelevant [what] reasoning in fact underlay the legislative decision.’” (alteration in original) (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980))).

<sup>31</sup> *Heller*, 509 U.S. at 324 (quoting *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978)).

<sup>32</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>33</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995). This formulation is often referred to as “strict scrutiny.” *Id.* at 227.

<sup>34</sup> *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). This formulation is often referred to as “intermediate scrutiny.” See *id.* at 570–71 (Scalia, J., dissenting) (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

<sup>35</sup> See Ryan S. James & Jane Zara, *Equal Protection*, 4 *GEO. J. GENDER & L.* 1, 6 (2002).

<sup>36</sup> *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (quoting *Carolene Prods. Co.*, 304 U.S. at 153 n.4) (finding classification based on alien status inherently suspect).

<sup>37</sup> *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)) (finding that close relatives did not constitute a suspect class).

<sup>38</sup> *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)) (finding that individuals over fifty years old did not constitute a suspect class).

<sup>39</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (finding that classifications based on sex is suspect).

society.”<sup>40</sup> The Court at times has been quite clear in its pronouncements that a certain class is or is not suspect.<sup>41</sup> But the question of whether heightened scrutiny applies for sexual orientation classifications has long vexed commentators and the courts.<sup>42</sup>

### B. *Sexual Orientation Classifications and the Supreme Court*

In 1985, the Supreme Court had its first opportunity to decide the proper level of scrutiny for sexual orientation classifications in *Rowland v. Mad River School District*.<sup>43</sup> When Marjorie Rowland, a high school guidance counselor, disclosed to her secretary that she was in love with a woman, her secretary became “upset” and reported the exchange to Rowland’s principal.<sup>44</sup> Rowland also disclosed her sexual orientation to a vice principal after being confronted by an angry mother who wanted to know why Rowland was advising her to accept her son’s homosexuality, which the mother claimed was “against the Bible.”<sup>45</sup> After Rowland was suspended for the remainder of the year and her contract was not renewed,<sup>46</sup> she sued the school district, and partially won in the district court.<sup>47</sup> But the Sixth Circuit reversed on the basis of a lack of comparator evidence.<sup>48</sup>

The Supreme Court denied review.<sup>49</sup> But Justice Brennan, in a dissent joined by Justice Marshall, wrote that the Sixth Circuit had “evade[d] the central question: may a State dismiss a public employee

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<sup>40</sup> *Id.*

<sup>41</sup> *See, e.g., id.* at 688 (“With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect . . .”).

<sup>42</sup> *See infra* Section I.B (discussing the Supreme Court’s treatment of sexual orientation classifications under the Equal Protection Clause).

<sup>43</sup> *See Rowland v. Mad River Local Sch. Dist. (Rowland I)*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985).

<sup>44</sup> *See Rowland v. Mad River Local Sch. Dist. (Rowland II)*, 470 U.S. 1009, 1016 n.11 (1985) (Brennan, J., dissenting from denial of petition for writ of certiorari); ELDON H. REILEY & CONNIE DE LA VEGA, *THE AMERICAN LEGAL SYSTEM FOR FOREIGN LAWYERS* n.43 (2012) (“The first suggestion by a U.S. Supreme Court Justice that sexual orientation might warrant strict scrutiny is in a dissent by Justice William Brennan from denial of certiorari, *Rowland v. Mad River School District*, 470 U.S. 1009 (1985)”).

<sup>45</sup> *See id.*

<sup>46</sup> *See Rowland I*, 730 F.2d at 446.

<sup>47</sup> *See id.* at 446–47. Rowland sued under two theories—that her termination violated her First Amendment right to free speech and her Fourteenth Amendment right to equal protection. *See Rowland II*, 470 U.S. at 1010.

<sup>48</sup> *See Rowland I*, 730 F.2d at 451–52. The Sixth Circuit held that Rowland’s equal protection could not proceed because she had not shown that she had been treated differently than similarly-situated heterosexual employees. *See id.* Justice Brennan would later observe that the Sixth Circuit’s demand for comparator evidence was made “[w]ithout citation to any precedent.” *See Rowland II*, 470 U.S. at 1010.

<sup>49</sup> *Rowland II*, 470 U.S. at 1009.

based on her bisexual status alone?”<sup>50</sup> To Brennan, the *Rowland* case raised “significant constitutional questions” under the Court’s equal protection precedents.<sup>51</sup> Brennan suggested that sexual orientation classifications might receive heightened scrutiny on the grounds that lesbian, gay, and bisexual individuals constituted “a significant and insular minority,” were “particularly powerless to pursue their rights openly in the political arena,” and were historically “the object of pernicious and sustained hostility.”<sup>52</sup>

Despite Brennan’s invitation to explore the issue, the Supreme Court has never explicitly decided whether sexual orientation classifications are constitutionally suspect. In *Romer v. Evans*, the Court purportedly applied rational basis to strike down a Colorado law<sup>53</sup> that repealed and prohibited any state or local measure protecting gays, lesbians, and bisexuals from discrimination.<sup>54</sup> At first glance, the Court’s application of rational basis would seem to reject Brennan’s view that classifications based on sexual orientation could be considered suspect. But upon closer inspection this becomes less clear.

After setting out the traditional test for rational basis review, Justice Kennedy, writing for the majority in *Romer*, stated that the challenged law “fail[ed], indeed defie[d], *even this conventional inquiry*.”<sup>55</sup> Some have interpreted this to mean not that the Court was declaring sexual orientation classifications to be non-suspect, but rather that heightening scrutiny was unnecessary because *even under rational basis review* the challenged law was unconstitutional.<sup>56</sup> Others have expressed skepticism that the *Romer* Court applied rational basis review in the first place—these commentators say that the Court’s scrutiny of the law’s purpose and tailoring is uncharacteristic of the highly deferential rational basis standard, thus indicating that the Court was taking a step in the direction of recognizing sexual orienta-

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<sup>50</sup> *Id.* at 1011.

<sup>51</sup> *See id.* at 1014, 1015–16 (“Whether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be advanced to permit their infringement, are important questions that this Court has never addressed . . .”).

<sup>52</sup> *Id.* at 1014.

<sup>53</sup> 517 U.S. 620, 631–32 (1996).

<sup>54</sup> *Id.* at 624.

<sup>55</sup> *Id.* at 632 (emphasis added).

<sup>56</sup> *See, e.g., Windsor v. United States*, 699 F.3d 169, 179 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013) (“[T]he Supreme Court’s decision to apply rational basis review in *Romer* does not imply to us a refusal to recognize homosexuals as a quasi-suspect class.”); Erwin Chemerinsky, *Same Sex Marriage: An Essential Step Towards Equality*, 34 Sw. U. L. REV. 579, 588 (2005) (suggesting that the *Romer* Court meant that “*even under rational basis review*, Amendment 2 [was] unconstitutional.”) (emphasis added).



tion as a suspect classification,<sup>57</sup> or at least applying a somewhat heightened form of review sometimes called “rational basis with bite.”<sup>58</sup>

But if Court watchers expected a clearer statement on the correct level of scrutiny to be forthcoming, they would be disappointed. To this day the Court has never resolved the scrutiny debate—even the Court’s same-sex marriage cases did not take up Brennan’s project. *United States v. Windsor*<sup>59</sup> held that the Defense of Marriage Act (DOMA) was unconstitutional on the grounds that “no legitimate purpose overcomes the purpose and effect [of DOMA] to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”<sup>60</sup> But, as in *Romer*, the Court did not clearly specify what level of scrutiny it was applying. On the one hand, the Court’s references to a “legitimate purpose” are in line with traditional rational basis review.<sup>61</sup> Yet the Court also scrutinized legislative intent and placed the burden on the government to justify its law—features more typical of a heightened standard of review.<sup>62</sup> One commentator, apparently resigned to the fact that there was not a clear answer to the scrutiny question in *Windsor*, declared that the Court had applied “rational basis with or without either bite or extra

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<sup>57</sup> See Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 137 (1997) (stating that *Romer* is a “step in [the] direction” of recognizing sexual orientation as a suspect classification); James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 110–11 (2000) (stating that *Romer* may be a step towards recognizing sexual orientation as a quasi-suspect classification).

<sup>58</sup> See Yoshino, *supra* note 25, at 760 (describing *Romer* as a rational basis with bite case).

<sup>59</sup> 133 S. Ct. 2675 (2013).

<sup>60</sup> *Id.* at 2696.

<sup>61</sup> See *id.* The term “legitimate purpose” is often used in connection with rational basis review. See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 17 (1992) (“The two exemptions at issue here rationally further legitimate purposes. The people of California reasonably could have concluded that older persons in general should not be discouraged from moving to a residence more suitable to their changing family size or income.”).

<sup>62</sup> See *Windsor*, 133 S. Ct. at 2693, 2696. For an example of the Court considering legislative intent under heightened scrutiny, see *Cooper v. Harris*, 137 S. Ct. 1455, 1481 (2017) (“This case turned not on the possibility of creating more optimally constructed districts, but on direct evidence of the General Assembly’s intent in creating the actual District 12, including many hours of trial testimony subject to credibility determinations.”). For an example of the Court placing the burden on the government to justify its law under heightened scrutiny, see *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (“Strict scrutiny is a searching examination, and it is the government that bears the burden to prove ‘that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.’” (alterations in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989))).

bite.”<sup>63</sup> Urged another: “*Windsor* isn’t enough: . . . the Court must clarify equal protection analysis for sexual orientation classifications.”<sup>64</sup>

But clarify it did not. In *Obergefell v. Hodges*,<sup>65</sup> Justice Kennedy, again writing for the majority, held that same-sex couples had a constitutional right to marry.<sup>66</sup> Far from clarifying whether sexual orientation was a suspect class, the Court’s opinion “eschewed class-based equal protection grounds” altogether, leading one commentator to assert that “Justice Kennedy squandered an important opportunity to leave a more enduring gay rights legacy.”<sup>67</sup>

### C. *Disarray in the Lower Courts*

#### 1. *Sexual Orientation Classifications*

Confusion and disuniformity have emerged in the absence of clear guidance by the Court on the question of whether sexual orientation is a suspect classification. Some circuits heighten scrutiny for sexual orientation classifications—the Second Circuit does so based on traditional suspect-class factors,<sup>68</sup> while the Ninth Circuit does so

<sup>63</sup> Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 *FORDHAM L. REV.* 155, 167 (2014) (suggesting that federalism concerns triggered the application of a somewhat heightened scrutiny standard in *Windsor*).

<sup>64</sup> See Stacey L. Sobel, *When Windsor Isn’t Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 *CORNELL J.L. & PUB. POL’Y* 493, 493 (2015) (arguing that clarification is needed regarding *Windsor*’s support for the use of a heightened scrutiny standard for sexual orientation cases).

<sup>65</sup> 135 S. Ct. 2584 (2015).

<sup>66</sup> *Id.* at 2604–05. The Court struck down state prohibitions on same-sex marriage on Due Process grounds—i.e., individuals may not be denied the fundamental right to marriage—and on Equal Protection grounds—i.e., states may not deny that fundamental right on the basis of sexual orientation. See *id.* at 2604 (“These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

<sup>67</sup> Peter Nicolas, *Obergefell’s Squandered Potential*, 6 *CALIF. L. REV. CIR.* 137, 138–39 (2015) (criticizing the *Obergefell* Court’s failure to declare sexual orientation a suspect classification warranting heightened scrutiny). Indeed, suspect-class analysis is entirely absent from the Court’s opinion, in line with Professor Yoshino’s observation in 2011 that “the Court has moved away from group-based equality claims.” Yoshino, *supra* note 25, at 748.

<sup>68</sup> See *Windsor v. United States*, 699 F.3d 169, 181–82 (2d Cir. 2012), *aff’d on other grounds*, 133 S. Ct. 2675 (2013) (finding that sexual orientation was a suspect classification on the grounds that “homosexuals as a group have historically endured persecution and discrimination . . . homosexuality has no relation to aptitude or ability to contribute to society . . . homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and . . . the class remains a politically weakened minority.”).

on the theory that the Supreme Court itself applied heightened scrutiny—sub silentio—in *United States v. Windsor*.<sup>69</sup>

But in the other circuits, rational basis remains the rule. The Sixth Circuit, for example, held that sexual orientation classifications were non-suspect in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*.<sup>70</sup> *Equality Foundation* involved a challenge to a Cincinnati charter amendment that forbade the city from enacting or enforcing any law giving protected status to lesbian, gay, or bisexual individuals.<sup>71</sup> In finding that sexual orientation classifications were non-suspect, the panel relied on *Bowers v. Hardwick*,<sup>72</sup> which had held that there was no “fundamental right to homosexuals to engage in acts of consensual sodomy.”<sup>73</sup> The *Equality Foundation* panel reasoned that lesbian, gay, and bisexual individuals could not be a suspect class because the very conduct supposedly placing them in that class was not constitutionally protected.<sup>74</sup>

The Supreme Court vacated and remanded for reconsideration in light of the Court’s intervening decision in *Romer*,<sup>75</sup> which found a similar state constitutional amendment violative of equal protection.<sup>76</sup> On remand, the Sixth Circuit held that the charter amendment was not unconstitutional under *Romer*, but did not revisit the scrutiny question or its reliance on *Bowers*.<sup>77</sup> “Because *Romer* included no mention of suspect class or its associated factors,” Joe Dunman explains, “the panel in *Equality Foundation II* took no effort to seriously reconsider their prior rejection of that analysis. . . . As far as the Sixth Circuit was concerned, *Romer* did not disrupt this status quo.”<sup>78</sup> Thus, “[t]he new decision summarily reaffirmed the court’s previous

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<sup>69</sup> In *SmithKline Beecham Corp. v. Abbott Laboratories*, the Ninth Circuit stated that the *Windsor* Court—sub silentio—applied heightened scrutiny to equal protection claims involving sexual orientation. See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (analyzing the level of scrutiny applied by the Supreme Court in *Windsor*). The panel cited the *Windsor* Court’s scrutiny of Congress’s purposes, its placement of the burden on the government, and the Court’s citations to its heightened scrutiny cases. *Id.* at 481–83.

<sup>70</sup> 54 F.3d 261, 267–68 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996).

<sup>71</sup> See *id.* at 264.

<sup>72</sup> 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>73</sup> *Id.* at 192–95.

<sup>74</sup> *Equal. Found.*, 54 F.3d at 267–68.

<sup>75</sup> See *Equal. Found.*, 518 U.S. at 1001.

<sup>76</sup> See *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

<sup>77</sup> See *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati (Equal. Found. II)*, 128 F.3d 289, 300–01 (6th Cir. 1997).

<sup>78</sup> L. Joe Dunman, *Blind Imitation: The Revolting Persistence of Bowers v. Hardwick*, 33 W. MICH. U. T.M. COOLEY L. REV. 67, 82 (2016).

holding” that *Bowers* foreclosed heightened scrutiny for sexual orientation classifications.<sup>79</sup>

But *Bowers* was not long for this world. In *Lawrence v. Texas*, the Court overruled *Bowers*, stating that it “was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.”<sup>80</sup>

Since *Equality Foundation*’s analytical starting point was that same-sex intimacy is not constitutionally protected under *Bowers*, you might assume that the Sixth Circuit would reconsider the issue in light of *Lawrence*. Yet this the Sixth Circuit has not done. In *Scarborough v. Morgan County Board of Education*, the Sixth Circuit reaffirmed that sexual orientation is not a suspect classification with a cursory citation to *Equality Foundation II*, providing no analysis or discussion whatsoever of *Lawrence*.<sup>81</sup> Indeed, rational basis review for sexual orientation classifications has been entrenched in the Sixth Circuit due to the “law of the circuit” doctrine, under which a circuit precedent can only be reconsidered if there has been a supervening decision by the Supreme Court, or if the issue is reconsidered by the full court sitting en banc<sup>82</sup>—a rare procedure.<sup>83</sup> So, despite the Supreme Court’s insistence that *Bowers* “was not correct when it was decided, and it is not correct today,”<sup>84</sup> “the legacy of *Bowers v. Hardwick* still persists.”<sup>85</sup>

## 2. Gender Identity Classifications

Courts are also in disaccord as to the proper level of scrutiny for gender identity-based classifications. In *Adkins v. City of New York*,<sup>86</sup> a district court concluded that transgender individuals are a quasi-suspect class on the grounds that they have historically been subject to discrimination and are a politically powerless minority, and that trans-

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<sup>79</sup> See *id.*

<sup>80</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>81</sup> 470 F.3d 250, 261 (6th Cir. 2006) (citing *Equal. Found. II*, 128 F.3d at 292–94); see also Dunman, *supra* note 78, at 89 (“Thus, in *Scarborough*, a unanimous Sixth Circuit panel summarily upheld circuit precedent whose reasoning relied totally on *Bowers v. Hardwick*, despite having been overruled by the Supreme Court three years prior.”).

<sup>82</sup> See *Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015).

<sup>83</sup> See Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 538 (2010) (“[E]n banc decisions are rare.”); Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 214 (1999) (“Circuit courts rarely invoke the en banc procedure . . .”).

<sup>84</sup> *Lawrence*, 539 U.S. at 578.

<sup>85</sup> Dunman, *supra* note 78, at 106; see also *Ondo*, 795 F.3d at 609 (“We have always applied rational-basis review to state actions involving sexual orientation.”).

<sup>86</sup> 143 F. Supp. 3d 134 (S.D.N.Y. 2015). In *Adkins*, the court allowed a transgender individual’s § 1983 claim relating to discrimination and mistreatment by police officers after being arrested at an Occupy Wall Street protest. See *id.* at 136, 142.

gender status is a discrete minority class that does not relate to one's ability to contribute to society.<sup>87</sup>

But in *Brown v. Zavaras*,<sup>88</sup> the Tenth Circuit concluded that gender identity is not a suspect classification,<sup>89</sup> relying on a since-overruled Ninth Circuit case, *Holloway v. Arthur Andersen & Co.*<sup>90</sup> *Holloway*, decided in 1977, had assumed that gender identity was not an immutable characteristic determined by birth.<sup>91</sup> But by 1995, the year that *Brown* was decided, this assumption had already come under fire in the academic literature.<sup>92</sup> Indeed, the *Brown* court conceded that “[r]ecent research concluding that [gender] identity may be biological suggests reevaluating *Holloway*.”<sup>93</sup> But despite recognizing the need for a reevaluation, the court demurred, stating that this was not the right case in which to do so because the plaintiff’s allegations were “too conclusory to allow proper analysis.”<sup>94</sup> Fair enough—courts need sufficient facts to allow for crisp presentation of the issues. Surely, though, the right case would soon present itself, and the court would reevaluate the proper level of scrutiny for gender identity classifications in light of modern scientific understandings.

Except that’s not at all what happened. Twenty-two years later, despite mounting evidence of a biological basis for gender identity,<sup>95</sup> the Tenth Circuit still has yet to reevaluate *Holloway*’s now forty-year-old medical assumptions, instead analyzing the equal protection claims of transgender plaintiffs under rational basis with a cursory citation to *Brown*.<sup>96</sup> Perhaps, upon a more fulsome consideration of

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<sup>87</sup> *Id.* at 139–40.

<sup>88</sup> 63 F.3d 967 (1995).

<sup>89</sup> *See id.* at 971.

<sup>90</sup> 566 F.2d 659 (1977), *overruled by* *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

<sup>91</sup> *See Holloway*, 566 F.2d at 663 (stating that it has not “been established that transsexuality is an ‘immutable characteristic determined solely by the accident of birth’ like race or national origin.” (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973))).

<sup>92</sup> *See* Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and Its Relation to Transsexuality*, 378 LETTERS TO NATURE 68, 70 (1995) (“Considered together with information from animals, then our study supports the hypothesis that gender identity alterations may develop as a result of an altered interaction between the development of the brain and sex hormones.”).

<sup>93</sup> *Brown*, 63 F.3d at 971.

<sup>94</sup> *Id.*

<sup>95</sup> *See, e.g.*, Laura Erickson-Schroth, *Update on the Biology of Transgender Identity*, 17 J. GAY & LESBIAN MENTAL HEALTH 150, 166 (2013) (concluding that “genetics and prenatal hormone exposure may play some role in transgender identity development”); Aruna Saraswat et al., *Evidence Supporting the Biologic Nature of Gender Identity*, 21 ENDOCRINE PRAC. 199, 202 (2015) (concluding that “[c]urrent data suggest a biologic etiology for transgender identity”).

<sup>96</sup> *See, e.g.*, *Druley v. Patton*, 601 Fed. App’x 632, 635 (10th Cir. 2015) (“To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for

the issues, the Tenth Circuit today would reach the same conclusion. Perhaps not. But the Tenth Circuit has not even attempted to ask the question, despite the likelihood that, since *Holloway*'s assumptions in the 1970's regarding the etiology of gender identity, the "facts have so changed . . . as to have robbed the old rule of significant application or justification."<sup>97</sup>

Another theory for heightening scrutiny for gender identity classifications is that such classifications are based on *sex*.<sup>98</sup> In *Glenn v. Brumby*,<sup>99</sup> the Eleventh Circuit surveyed the Supreme Court's equal protection jurisprudence and concluded that "[e]ver since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of *gender stereotypes*."<sup>100</sup> For example, the Court has denounced "traditional, often inaccurate, assumptions about the proper roles of men and women,"<sup>101</sup> and warned that government decisionmakers "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."<sup>102</sup> From these cases the Eleventh Circuit concluded that discrimination based on gender-nonconformity is sex discrimination.<sup>103</sup> And, since the court considered anti-transgender discrimination to be tantamount to discrimination based on gender nonconformity, heightened scrutiny applied.<sup>104</sup>

But other courts have rejected this approach. In *Johnston v. University of Pittsburgh*, a transgender student at a public university was told by the administration that he could not use male bathroom and

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purposes of Equal Protection claims." (citing *Brown*, 63 F.3d at 972)); *Oz'etax v. Ortiz*, 170 Fed. App'x 551, 553 (10th Cir. 2006) ("Equal Protection claims, like this one, that do not involve a fundamental right or suspect classification, are subject to a rational basis review." (citing *Brown*, 63 F.3d at 972)).

<sup>97</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (setting forth analytical factors for the overruling of precedent, in the context of the Court's abortion rights case law).

<sup>98</sup> Under the Supreme Court's equal protection precedents, sex-based classifications are suspect; they are upheld only where they serve "important governmental objectives" and where the means employed are "substantially related to the achievement of those objectives." See *United States v. Virginia*, 518 U.S. 515, 533 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

<sup>99</sup> 663 F.3d 1312 (11th Cir. 2011).

<sup>100</sup> *Id.* at 1319 (emphasis added).

<sup>101</sup> *Miss. Univ. for Women*, 458 U.S. at 726.

<sup>102</sup> *Virginia*, 518 U.S. at 533 (1996).

<sup>103</sup> See *Brumby*, 663 F.3d at 1319.

<sup>104</sup> See *id.* at 1316, 1320. The court also concluded that such discrimination was sex discrimination under Title VII. *Id.* at 1317.

locker room facilities.<sup>105</sup> When he persisted in using facilities consistent with his gender identity, university administrators imposed what they apparently deemed a reasonable and proportionate sanction: They revoked his scholarship, expelled him from college, banned him from campus, and filed a criminal complaint leading to him being charged with indecent exposure, criminal trespass, and disorderly conduct.<sup>106</sup> Johnston sued alleging equal protection violations.<sup>107</sup>

Johnston's brief cited *Brumby* for the proposition that anti-transgender discrimination is sex discrimination based on a gender stereotyping theory.<sup>108</sup> Johnston explained that the stereotype at issue in his suit was the "assumption that a 'real' man cannot be transgender—that is, that a man cannot have been assigned the female sex at birth."<sup>109</sup> As the World Professional Association for Transgender Health explains: "an individual's sex depends primarily on gender identity. Other factors such as internal reproductive organs, external genitalia, chromosomes, hormones, and secondary-sex characteristics also play a role but are not nearly as important as gender identity in determining one's sex."<sup>110</sup>

But the court did not accept Johnston's argument. "[W]hile Plaintiff might identify his *gender* as male, his *birth sex* is female. . . . [T]he law recognizes certain distinctions between male and female on the basis of *birth sex*. Thus, even though Plaintiff is a transgender male, his *sex* is female . . . ."<sup>111</sup> In this way, the court uncritically employs the very same logic Johnston said gave rise to the equal protection violation in the first place. In other words, the court assumes that Johnston's sex must be female because he was assigned the female sex at birth—the *exact* stereotype at issue in the case. Having thus dismissed Johnston's gender stereotyping theory, the court proceeded to uphold the university's actions under rational basis review.<sup>112</sup>

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<sup>105</sup> *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 662–63 (W.D. Pa. 2015). For discussion of the consequences of denying a transgender individual restrooms consistent with their gender identity, see discussion *infra* note 232 and accompanying text.

<sup>106</sup> See *Johnston*, 97 F. Supp. 3d at 664.

<sup>107</sup> See *id.* at 666.

<sup>108</sup> See Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss Second Amended Complaint at 15, *Johnston*, 97 F. Supp. 3d 657 (No. 3:13-cv-00213-KRG).

<sup>109</sup> *Id.* at 20.

<sup>110</sup> Brief of Amici Curiae: The World Professional Ass'n for Transgender Health, Pediatric Endocrine Society, et al. in Support of Appellant at 14–15, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016) (No. 15-2056) [hereinafter WPATH Brief].

<sup>111</sup> *Johnston*, 97 F. Supp. 3d at 671 (third and fourth emphasis added).

<sup>112</sup> See *id.* at 668, 672.

### 3. *Burden-Shifting and Qualified Immunity*

The *Johnston* court, in its equal protection analysis, quotes at length *Ulane v. East Airlines, Inc.*, a case in which the Seventh Circuit held that Title VII did not prohibit anti-transgender discrimination.<sup>113</sup> *Johnston* thereby transmutes a case involving the scope of Title VII (based largely on Congress's intent when it passed the Civil Rights Act of 1964),<sup>114</sup> into persuasive precedent circumscribing the scope of equal protection. The line blurring between equal protection and Title VII analysis is troubling in itself. But some courts go much further, abolishing the distinction altogether.

Consider, for example, the case of Sandra Ambris, a harbor master for the City of Cleveland.<sup>115</sup> According to Ambris's complaint, her supervisor routinely used the epithets "queer," "faggot," and "dyke" around her, and questioned employees about her sexual orientation and female partner.<sup>116</sup> After Ambris helped bring the Gay Games to Cleveland, her supervisor ranted: "I can't believe I have to be involved with those gays and dykes."<sup>117</sup> Ambris complained to a higher-up—but her supervisor caught wind of this, and terminated her, Ambris alleged, under a pretext.<sup>118</sup>

On these alleged facts, a court easily might find that the supervisor's actions were motivated by discriminatory animus.<sup>119</sup> And, under *Romer*, a governmental act motivated by animus lacks a rational relationship to a legitimate state interest, and would therefore fail even the deferential rational basis test.<sup>120</sup> Why, then, did the court dismiss Ambris's equal protection claim? The answer lies not in the substance of the Equal Protection Clause, but in Title VII. In equal protection cases involving government employers, courts often employ the *McDonnell Douglas* burden-shifting framework,<sup>121</sup> a stan-

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<sup>113</sup> See *id.* at 671 (discussing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)).

<sup>114</sup> See *Ulane*, 742 F.2d at 1085–86.

<sup>115</sup> Ambris v. City of Cleveland, No. 1:12CV774, 2012 WL 5874367, at \*2 (N.D. Ohio Nov. 19, 2012).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See *id.* at \*3.

<sup>119</sup> See Robin B. Wagner, *Are Gay Rights Clearly Established? The Problems with the Qualified Immunity Doctrine*, 63 DEPAUL L. REV. 869, 878 (2014) ("But the *Gill*, *Lathrop*, and *Ambris* plaintiffs seemingly presented the easiest cases—there was clear animus in each allegation of discrimination . . .").

<sup>120</sup> See *Romer v. Evans*, 517 U.S. 620, 632 (1996).

<sup>121</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (setting forth the framework for evaluating discrimination claims under Title VII).



dard ordinarily applied in Title VII cases.<sup>122</sup> Under this framework, plaintiffs alleging wrongful termination have the initial burden to show that “(1) [they] belong[ ] to a protected class; (2) [they were] qualified for [their] job; (3) despite [their] qualifications, [they were] discharged; and (4) the job was not eliminated after [their] discharge.”<sup>123</sup>

The court dismissed the case, finding that Ambris could not establish a *prima facie* case of discrimination—and thus had not stated an equal protection claim—because she could not demonstrate that she was a member of a protected class under Title VII.<sup>124</sup> In other words, the court assumed that the scope of Title VII protection—no matter how broadly or narrowly Congress defined it—governed the scope of equal protection in the government employment discrimination context. But this makes no sense, because the *McDonnell Douglas* framework is used in public employment equal protection cases to allocate the burden of production, not to define the scope or content of equal protection.<sup>125</sup> Indeed, some courts have said so explicitly.<sup>126</sup> But under the *Ambris* court’s rule, the scope of a public employee’s equal protection rights are left to the whims of Congress. *Romer*’s prohibition on governmental decisions motivated by discriminatory animus is wholly inapplicable, said the *Ambris* court, on account of *Romer* being “decided outside of an employment context.”<sup>127</sup> The result is nothing short of perverse: Title VII, a law designed to combat discrimination, results in *less* constitutional protection for LGBT public employees than had it never been enacted.

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<sup>122</sup> See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004) (“[T]he showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under section § 1983.” (citing *Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir.1988))).

<sup>123</sup> *Perry v. Woodward*, 199 F.3d 1126, 1135 (10th Cir. 1999).

<sup>124</sup> *Ambris v. City of Cleveland*, No. 1:12CV774, 2012 WL 5874367, at \*5 (N.D. Ohio Nov. 19, 2012).

<sup>125</sup> See *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (stating that the *McDonnell Douglas* framework provides a “sensible, orderly way to evaluate the evidence” in § 1981 public employment cases (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978))); see also *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n.1 (1993) (stating that the Court would use the *McDonnell Douglas* framework to allocate the burden of production in a § 1983 public employment case).

<sup>126</sup> See, e.g., *Hutchinson v. Cuyahoga Cty. Bd. of Cty. Comm’rs*, No. 1:08–CV–2966, 2011 WL 1563874, at \*7 (Apr. 25, 2011) (“The Court is not convinced that application of Title VII’s framework—i.e. the *McDonnell Douglas/Burdine* framework—requires wholesale application of Title VII’s limitations on what classes are protected whenever an equal protection claim arises in the employment context.”) (emphasis in original) (citation omitted).

<sup>127</sup> See *Ambris*, 2012 WL 5874367, at \*9.

Even if a plaintiff successfully proves a violation of their constitutional rights, they still might not recover. The doctrine of qualified immunity shields public officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>128</sup> In *White v. City of New York*,<sup>129</sup> for example, the plaintiff alleged that police officers ignored repeated threats on his life solely because he was transgender.<sup>130</sup> The District Court for the Southern District of New York agreed that a violation of equal protection had occurred, yet dismissed the claim.<sup>131</sup> Crucially, the court stated that a previous decision from the District applying heightened scrutiny for gender identity classifications<sup>132</sup> was not sufficient to clearly establish the constitutional violation, as the rule had not yet been adopted by the Second Circuit or the Supreme Court.<sup>133</sup> “Thus,” the court said, “the individual officers implicated here could not be expected to anticipate that their actions would be subject to any standard more stringent than rational basis review, and because their actions were not arbitrary or irrational” the officers were entitled to qualified immunity.<sup>134</sup>

The Rorschach blot that is the Supreme Court’s sexual orientation jurisprudence has spawned a congeries of approaches and theories in the circuits. Perhaps sexual orientation classifications can only be upheld when accompanied by an “exceedingly persuasive” justification;<sup>135</sup> perhaps the standard is so lax that even discrimination motivated by outright animus and hostility towards sexual minorities is fine.<sup>136</sup> The courts’ standard for gender identity classifications is in similar disarray. Maybe the notion that “real men” cannot be assigned the female sex at birth is a prohibited sex stereotype;<sup>137</sup> maybe this argument goes so far over the judge’s head that he employs the stere-

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<sup>128</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

<sup>129</sup> 206 F. Supp. 3d 920 (S.D.N.Y. 2016).

<sup>130</sup> *See id.* at 925–26.

<sup>131</sup> *See id.* at 932, 934.

<sup>132</sup> *See supra* notes 86–87 and accompanying text (discussing *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015)).

<sup>133</sup> *See White*, 206 F. Supp. 3d at 933.

<sup>134</sup> *See id.* at 934.

<sup>135</sup> *See Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

<sup>136</sup> *See Ambris v. City of Cleveland*, No. 1:12CV774, 2012 WL 5874367, at \*9 (N.D. Ohio Nov. 19, 2012) (finding *Romer*’s discriminatory animus rule inapplicable in the government employer context).

<sup>137</sup> *See Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (finding transgender discrimination to be sex-based discrimination on a gender stereotyping theory); *see also supra* notes 115–27 and accompanying text (discussing *Ambris*).

otype himself.<sup>138</sup> One conclusion is nigh unavoidable: The courts—many of them anyway—are failing to fully vindicate the equal protection rights of LGBT individuals.

But judges are not the only ones who enforce equal protection.

## II

### ADMINISTRATIVE CONSTITUTIONALISM AND AGENCY ENFORCEMENT OF LGBT RIGHTS

Much has been written of late on the topic of administrative constitutionalism—actions by administrative agencies to interpret and implement the Constitution.<sup>139</sup> Administrative constitutionalism includes agency actions to enforce constitutional rules established in the judiciary, but this does not constitute its outer limits. Agency administrators, who have a sworn duty to uphold the Constitution, *themselves* play a role in shaping constitutional meaning. In other words, “constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.”<sup>140</sup> On this view—sometimes termed “polycentric constitutionalism”—constitutional engagement is “institutionally interactive rather than linear.”<sup>141</sup>

Administrative constitutionalism theories are not without normative challenges. As Gillian Metzger explains, “[t]he concern is that administrative constitutionalism inverts the proper constitutional relationship between agencies and Congress . . . .”<sup>142</sup> Agencies are supposed to be the faithful agents of Congress; if they take constitutional concerns into account in policymaking, it “may change the shape of federal regulation and perhaps make it somewhat less effective in achieving congressional regulatory goals.”<sup>143</sup> But as Metzger then observes—and as we will explore in greater detail below—“an agency’s obligation to follow congressional mandates does not mean that it can ignore constitutional norms . . . .”<sup>144</sup> Agencies must be

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<sup>138</sup> See *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 671 (W.D. Pa. 2015) (“[T]he law recognizes certain distinctions between male and female on the basis of birth sex. Thus, even though Plaintiff is a transgender male, his sex is female . . . .”).

<sup>139</sup> See *supra* note 18; Metzger, *supra* note 18, at 1897 (defining administrative constitutionalism).

<sup>140</sup> ESKRIDGE & FEREJOHN, *supra* note 20, at 69.

<sup>141</sup> See *id.*; see also Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 658 (1993) (“Courts play a prominent role, but theirs is assuredly not the only voice in the dialogue.”).

<sup>142</sup> Metzger, *supra* note 18, at 1917.

<sup>143</sup> *Id.* at 1917–18 (quoting Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 523 (2010)).

<sup>144</sup> *Id.* at 1918.

“constitutionally ‘sensitive’ faithful agent[s], interpreting statutes within the overall context of the legal order.”<sup>145</sup>

Agencies engage with the Constitution in a multitude of ways. Agencies directly interpret and implement constitutional provisions—what is sometimes referred to as “large C” constitutionalism.<sup>146</sup> For example, Karen Tani explains how Social Security Board lawyers during the New Deal era “developed a theory about how the Fourteenth Amendment’s Equal Protection Clause ought to apply in one crucial context—the administration of federal grants-in-aid—and they put that theory into practice.”<sup>147</sup> Agencies also engage the Constitution *indirectly*, by enforcing legislation that promotes constitutional values—sometimes known as “small c” constitutionalism.<sup>148</sup> For example, Eskridge and Ferejohn describe how the EEOC adopted the position that discrimination on the basis of pregnancy was sex discrimination under Title VII.<sup>149</sup>

The existing literature has not studied administrative constitutionalism in the LGBT rights context in depth. But given the inconsistency of LGBT rights enforcement in the judiciary, it is profoundly important and worthy of closer examination—the task we now turn to. In Part I, I explained how the issue of transgender individuals’ access to facilities raises significant equal protection questions. In this Part, I will survey the disposition of that issue in the administrative state in order to demonstrate that agencies, in a range of contexts—from education to healthcare to housing—rely on their own constitutional understandings in crafting administrative rules and guidance. I will then conclude with a brief descriptive account of administrative constitutionalism in adjudicative settings.

#### A. *DOE’s Title IX Guidance on Sex-Segregated School Facilities*

We turn first to schools. In 2016, the Department of Education and Department of Justice issued a “Dear Colleague” letter,<sup>150</sup> stating

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<sup>145</sup> *Id.* (quoting Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 508 (2005)).

<sup>146</sup> *See, e.g.*, ESKRIDGE & FEREJOHN, *supra* note 20, at 1–2.

<sup>147</sup> Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825, 828–29 (2015).

<sup>148</sup> *See id.* at 829 & n.13.

<sup>149</sup> *See* ESKRIDGE & FEREJOHN, *supra* note 20, at 32.

<sup>150</sup> Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., and Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, U.S. Dep’t of Justice (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [hereinafter DOE Guidance]. The Departments characterized the letter as “significant guidance.” *Id.* at 1.

that in order to comply with Title IX of the Education Amendments of 1972,<sup>151</sup> schools receiving federal funding “must not treat a transgender student differently from the way it treats other students of the same gender identity.”<sup>152</sup> Thus, “[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.”<sup>153</sup> Under this policy, the conduct of the University of Pittsburgh in the *Johnston* case would have constituted a clear violation of Title IX.<sup>154</sup>

What is important to understand is that the constitutional character of the DOE’s guidance has two dimensions. First, we can think of Title IX enforcement as itself advancing equal protection norms. By prohibiting schools receiving federal funding from discriminating on the basis of sex,<sup>155</sup> Title IX has a “small c” constitutional character—it is legislation that embodies certain constitutional values. But there is *also* evidence that the DOE was guided by its beliefs as to what was *actually required* by the Equal Protection Clause—i.e., “large C” constitutionalism. Consider the DOE’s insistence that “the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.”<sup>156</sup> This is the language of equal protection.<sup>157</sup> And, tellingly, the DOE supports this proposition by citing to three equal protection cases<sup>158</sup>—*Glenn v. Brumby*,<sup>159</sup> *Palmore v. Sidoti*,<sup>160</sup> and *City of Cleburne v. Cleburne Living Center*.<sup>161</sup> The selection of these cases is not random—each speaks to the issues involved in the transgender facilities-access debate in some way: *Cleburne* rejects governmental policies predi-

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<sup>151</sup> 20 U.S.C. § 1681 (2012).

<sup>152</sup> DOE Guidance, *supra* note 150, at 2.

<sup>153</sup> *Id.* at 3.

<sup>154</sup> See *supra* notes 105–07 and accompanying text (discussing the *Johnston* case).

<sup>155</sup> See 20 U.S.C. § 1681 (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

<sup>156</sup> *Id.* at 2.

<sup>157</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (“DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper.”); *Bowers v. Hardwick*, 478 U.S. 186, 212 (1986) (Blackmun, J., dissenting) (“No matter how uncomfortable a certain group may make the majority of this Court, we have held that ‘mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.’” (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975))).

<sup>158</sup> See DOE Guidance, *supra* note 150, at 6 nn.5 & 8.

<sup>159</sup> 663 F.3d 1312 (11th Cir. 2011).

<sup>160</sup> 466 U.S. 429 (1984).

<sup>161</sup> 473 U.S. 432 (1985).

cated on unfounded safety concerns and animus;<sup>162</sup> *Palmore* suggests that even a purpose to protect someone from harassment cannot stand if it codifies impermissible prejudice;<sup>163</sup> and *Brumby* states that gender identity classifications are subject to heightened scrutiny.<sup>164</sup> Thus, we can comprehend the DOE's guidance as doing more than clarifying its position as to what Title IX required. It was clarifying its position as to what *equal protection* required.

### *B. HHS and the Affordable Care Act's Nondiscrimination Mandate*

A similar debate has played out in the healthcare context. In implementing the Affordable Care Act, the Department of Health and Human Services (HHS) has had to grapple with the question of whether allowing transgender individuals to use facilities corresponding to their gender identity violates the privacy rights of cis-gender individuals using the same facilities.

The right to privacy was one of the issues at play in *G.G. ex rel. Grimm v. Gloucester County School Board*.<sup>165</sup> In *G.G.*, the Fourth Circuit reversed the dismissal of a transgender student's claim that his school district's policy requiring students to use restrooms conforming to their sex assigned at birth violated Title IX.<sup>166</sup> Writing in dissent, Judge Niemeyer claimed that allowing a transgender boy to use the boys' restroom implicated constitutional privacy rights because “[a]n individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex.”<sup>167</sup>

This may strike you as a little odd. Generally, people do not expose their “nude body, genitalia, and other private parts” to other

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<sup>162</sup> See *id.* at 448 (“[M]ere negative attitudes, or [unsubstantiated] fear . . . are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.”).

<sup>163</sup> See *Palmore*, 466 U.S. at 433 (“The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”).

<sup>164</sup> See *Brumby*, 663 F.3d at 1320 (“Accordingly, governmental acts based upon gender stereotypes—which presume that men and women’s appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny . . .”).

<sup>165</sup> 822 F.3d 709 (4th Cir. 2016). The Supreme Court granted certiorari, 137 S. Ct. 369 (2016), but vacated the decision and remanded to the Fourth Circuit after the Department of Education issued new guidance. 137 S. Ct. 1239 (mem). See *generally infra* note 268 and accompanying text (discussing the changed guidance).

<sup>166</sup> See *G.G.*, 822 F.3d at 726–27. The basis for the Fourth Circuit’s reversal was that the DOE’s interpretation of its Title IX regulation in the Dear Colleague letter was entitled to *Auer* deference. See *id.* at 723.

<sup>167</sup> See *id.* at 734 (Niemeyer, J., dissenting in part).

people when they use the bathroom. But having thusly defined the supposed privacy interest, the dissent characterized the majority's decision as an "unprecedented holding [which] overrules custom, culture, and the very demands inherent in human nature for privacy and safety."<sup>168</sup>

*Students & Parents for Privacy v. United States Department of Education*<sup>169</sup> addressed a similar argument on similar facts, but with a different analysis of the relevant privacy right. At issue was a transgender student's access to a locker room equipped with privacy curtains.<sup>170</sup> But unlike Judge Niemeyer, Judge Gilbert rejected defining the privacy interest as an interest in not having one's body exposed.<sup>171</sup> Instead, he held that "students do not have a fundamental constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs."<sup>172</sup>

Judge Niemeyer in *G.G.* and Judge Gilbert in *Students & Parents for Privacy* were evaluating substantially the same issue, yet they defined the privacy right in radically different ways, with significant effects on the resulting analysis. Judge Niemeyer's framing allowed him easily to connect transgender bathroom use to privacy interests long recognized in the law. "[C]ourts," Judge Niemeyer opined, "have consistently recognized that the need for [bodily] privacy is inherent in the nature and dignity of humankind."<sup>173</sup> But Judge Gilbert defined the right far more narrowly:

No case recognizes a right to privacy that insulates a person from coming into contact with someone who is different than they are, or who they fear will act in a way that causes them to be embarrassed or uncomfortable, when there are alternative means for both individuals to protect themselves from such contact, embarrassment, or discomfort.<sup>174</sup>

In this way, identification of the relevant privacy right can be determinative in the constitutional analysis, and this point was not lost on agency decisionmakers. Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the basis of sex,<sup>175</sup> which HHS

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<sup>168</sup> *Id.* at 731.

<sup>169</sup> No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016).

<sup>170</sup> *See id.* at \*4.

<sup>171</sup> *See id.* at \*22.

<sup>172</sup> *Id.* at \*27.

<sup>173</sup> *G.G.*, 822 F.3d at 734 (Niemeyer, J., dissenting in part).

<sup>174</sup> *Students & Parents for Privacy*, 2016 WL 6134121, at \*24.

<sup>175</sup> *See* Patient Protection and the Affordable Care Act, 42 U.S.C. § 18116 (2010) ("[A]n individual shall not, on the ground prohibited under . . . title IX of the Education Amendment of 1972 . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination . . .").

interprets to prohibit “discrimination on the basis of gender identity.”<sup>176</sup> Under this interpretation, covered entities may provide sex-segregated facilities but may not exclude people from using such facilities in accordance with their gender identity.<sup>177</sup> Crucially, HHS in its rule dismisses constitutional privacy objections, stating: “Courts have rejected claims that any legal right to privacy is violated and that one person suffers any cognizable harm *simply by permitting another person access to a sex-specific program or facility which corresponds to their gender identity.*”<sup>178</sup> HHS thus defines the privacy interest much in the same way that Judge Gilbert did in *Students & Parents for Privacy*,<sup>179</sup> thereby taking sides in a live constitutional debate as to what is (and is not) at stake when transgender people use facilities corresponding to their gender identity.

### C. HUD’s Equal Access Rule and Shelter Placement for Transgender Clients

The issue of transgender individuals’ access to facilities has likewise come before agency administrators in the housing context. On February 20, 2015, the Department of Housing and Urban Development (HUD) issued a guidance document stating that homeless shelters receiving federal funds should place transgender clients in accordance with their gender identity.<sup>180</sup> The guidance clarified HUD’s “Equal Access Rule,” a regulation barring sexual orientation or gender identity discrimination by HUD program participants.<sup>181</sup> But what is interesting about the Equal Access Rule is that, unlike DOE’s Title IX guidance or HHS’s ACA regulation, HUD was not acting to implement a nondiscrimination mandate. Rather, it derived its authority from the Housing Act of 1949, which states: “The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require . . . the reali-

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<sup>176</sup> 45 C.F.R. § 92.4 (2016).

<sup>177</sup> Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,409 (May 18, 2016) (codified at 45 C.F.R. pt. 92 (2016)).

<sup>178</sup> *Id.* at 31,389 (emphasis added).

<sup>179</sup> *Students & Parents for Privacy*, 2016 WL 6134121, at \*27 (defining the privacy interest as a “right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs”).

<sup>180</sup> See U.S. DEP’T OF HOUS. & URBAN DEV., NOTICE NO. CPD-15-02, APPROPRIATE PLACEMENT FOR TRANSGENDER PERSONS IN SINGLE-SEX EMERGENCY SHELTERS AND OTHER FACILITIES 3 (2015), <https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf>.

<sup>181</sup> See Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5674 (Feb. 3, 2012) (codified at 24 C.F.R. pt. 5 (2016)) [hereinafter Equal Access Rule].



zation as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . . .”<sup>182</sup>

HUD construed this provision as giving it authority to implement regulations prohibiting sexual orientation and gender identity discrimination.<sup>183</sup> But reading § 1441 in context, it is not clear that this section is best understood as setting forth a nondiscrimination principle. The reference to “every American family” is perhaps susceptible to that meaning, but it may simply mean that Congress sought for HUD to act comprehensively. We can better understand HUD’s actions, however, once we consider § 1441 not in vacuo, but as guided by constitutional considerations. In a 2013 speech outlining the actions HUD had taken to safeguard LGBT rights (including promulgation of the Equal Access Rule), Secretary Shaun Donovan urged an LGBT group to “continue your advocacy to further the cause of fair housing for LGBT individuals—and *all Americans denied equal protection under the laws.*”<sup>184</sup> Similarly, in announcing HUD’s 2015 guidance, Secretary Julián Castro remarked: “I believe *it’s our duty to ensure equal protection for the LGBT community*, especially when someone is turning to a homeless shelter to get back on their feet. . . . It’s an injustice that any transgender person is mistreated when seeking help, which is why HUD is taking action.”<sup>185</sup> These statements help us understand that HUD, in promulgating the Equal Access Rule, was guided not just by the text of § 1441 but also by norms and values located in the Constitution. It is in this way that agencies might act to police equal protection for LGBT individuals even where they are not implementing Congress’s civil rights legislation or a nondiscrimination mandate.

#### D. Adjudicative Settings

Administrative constitutionalism is not just limited to rulemaking and guidance. Agencies promote constitutional norms through administrative adjudications and their participation in litigation, either as a party or by filing amicus briefs or statements of interest. Sometimes this takes the form of “small c” constitutionalism—the EEOC, for

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<sup>182</sup> 42 U.S.C. § 1441 (2012).

<sup>183</sup> See Equal Access Rule, 77 Fed. Reg. at 5662 & n.1.

<sup>184</sup> Shaun Donovan, Sec’y, U.S. Dep’t of Hous. & Urban Dev., Prepared Remarks Before the National Association of Gay and Lesbian Real Estate Professionals (NAGLREP) (May 15, 2013) (emphasis added), <https://archives.hud.gov/remarks/donovan/speeches/2013-05-15.cfm>.

<sup>185</sup> Julián Castro, Sec’y, U.S. Dep’t of Hous. & Urban Dev., Remarks of Secretary Julián Castro at the National Alliance to End Homelessness 2015 National Conference on Ending Family and Youth Homelessness (Feb. 20, 2015) (emphasis added), <https://archives.hud.gov/remarks/castro/speeches/2015-02-20.cfm>.

example, recently adopted the position that Title VII prohibits employers from discriminating against employees on the basis of sexual orientation or gender identity.<sup>186</sup> But it also takes the form of “large C” constitutionalism—for example, the DOJ’s 2011 decision not to defend DOMA on the ground that it believed sexual orientation classifications should be subject to heightened scrutiny and § 3 of DOMA could not survive such scrutiny.<sup>187</sup> Another example is the Oregon Bureau of Labor and Industries’ decision upholding an Oregon antidiscrimination statute against a First Amendment challenge mounted by a bakery that refused to bake a wedding cake for a same-sex couple.<sup>188</sup>

On the state and federal levels and across the full spectrum of subject matters, agencies engage in administrative constitutionalism to protect LGBT individuals by enforcing equal protection norms. Sometimes it is explicit and sometimes it is implicit, and the mechanisms range from guidance to rulemaking to adjudication and litigation. What is clear, though, is that—whatever form it may take—agencies routinely implement the statutes that govern our daily lives with an eye towards enforcing the equality principles embodied by the Fourteenth Amendment.

But should they?

### III

#### IN DEFENSE OF ADMINISTRATIVE CONSTITUTIONALISM IN THE LGBT RIGHTS CONTEXT

Perhaps you find this whole endeavor somewhat unsettling. That’s fair—we’re not accustomed to the idea of agencies interpreting and implementing constitutional provisions in ways that diverge from

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<sup>186</sup> See *Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641, at \*10 (U.S. Equal Emp’t Opportunity Comm’n July 15, 2015) (holding that discrimination on the basis of sexual orientation is cognizable as discrimination on the basis of sex under Title VII); *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at \*1 (U.S. Equal Emp’t Opportunity Comm’n Apr. 20, 2012) (holding that discrimination based on gender identity, change of sex, or transgender status is cognizable under Title VII).

<sup>187</sup> See Press Release, Att’y Gen., U.S. Dept. of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <https://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act>.

<sup>188</sup> See *In re Klein*, 34 BOLI 102, 122–23 (2015), [http://www.oregon.gov/boli/Legal/BOLI\\_Final\\_Orders/34\\_BOLI\\_Orders.pdf](http://www.oregon.gov/boli/Legal/BOLI_Final_Orders/34_BOLI_Orders.pdf). The Supreme Court has granted certiorari in a similar case, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017), involving a First Amendment challenge to enforcement of a state public accommodations law prohibiting discrimination on the basis of sexual orientation as applied to a cake shop that declined to create a wedding cake for a same-sex couple, see *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 280, 283 (Colo. App. 2015).

the courts. You might wonder: Just how far are we willing to allow agencies to go in the name of equal protection? And do we really desire a system that conceives of its unelected executive branch administrators as constitutional arbiters, ruling on questions playing out in the courts?<sup>189</sup>

To be sure, administrative constitutionalism has been crucial in safeguarding LGBT rights. But it does not have to be a free-for-all. There is a way of understanding administrative constitutionalism that might allay the concerns of even the most ardent skeptic. In this Part, I argue that agencies are justified in their robust enforcement of LGBT rights where these rights have been underenforced in the judicial and legislative branches. In particular, I identify institutional considerations, majoritarian backlash, and slippery slope fears as factors inhibiting courts and legislatures from fully enforcing equal protection in the LGBT rights context. I then address the regulatory rollback critique, arguing that rollbacks in the wake of a new presidential administration does not justify turning away from administrative constitutionalism as a tool for enforcement of equal protection norms.

### A. *Underenforcement in the Judiciary*

It may seem a little strange to conceive of courts as “under-enforcing” or “overenforcing” constitutional rights. After all, aren’t courts the ones who say what the law is?<sup>190</sup>

In *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, Lawrence Sager explains that courts sometimes decline to fully enforce constitutional provisions for “institutional” reasons.<sup>191</sup> Consider *San Antonio Independent School District v. Rodriguez*, where the Court held that Texas’s public school financing scheme did not violate equal protection.<sup>192</sup> Sager observes that the Court, in reaching this conclusion, cited federalism concerns and the Court’s lack of institutional competence to evaluate taxation schemes.<sup>193</sup> “Whatever view one takes of these concerns,” says Sager, “it is difficult to understand them as speaking even indirectly to the scope or content of the concept of equal protection.”<sup>194</sup> Federalism

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<sup>189</sup> Indeed, these objections have been raised in the literature. See *supra* notes 139–45 and accompanying text.

<sup>190</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); see also *supra* note 16.

<sup>191</sup> See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217–18 (1978).

<sup>192</sup> 411 U.S. 1, 6 (1973).

<sup>193</sup> See Sager, *supra* note 191, at 1218.

<sup>194</sup> *Id.*

and institutional competence relate not to the question of equal protection, but to “the question of to what limits the federal judiciary should reach in interpreting and enforcing” equal protection.<sup>195</sup> And so the *Rodriguez* case cannot be understood as grounded in equal protection considerations, but rather in considerations relating to the judicial function and the Court as an institution. It is in this way that equal protection norms may become underenforced.<sup>196</sup>

But Sager explains that notwithstanding judicial underenforcement, agencies are still required to fully enforce constitutional provisions. “This obligation to obey constitutional norms at their unenforced margins,” says Sager, “requires governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions.”<sup>197</sup> Public officials are not free to imperil “constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins.”<sup>198</sup> On this view, courts impose constitutional floors, not constitutional ceilings, and agencies have the obligation to enforce those norms that are underpoliced in the judiciary.<sup>199</sup>

With this in mind, consider again the cases surveyed in Part I, where courts dismissed the equal protection claims of LGBT plaintiffs. In *Equality Foundation*, the Sixth Circuit ruled that sexual orientation is not a suspect classification,<sup>200</sup> relying on *Bowers v. Hardwick*, a case that has now long been overruled and described by the Court as “not correct when it was decided.”<sup>201</sup> Yet the Sixth Circuit has not reconsidered the issue in light of *Lawrence*, and indeed rational basis

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<sup>195</sup> *Id.* (arguing that the concerns the Court voices in *Rodriguez* do not seem to speak to the scope or content of equal protection but rather to the limits of the federal judiciary).

<sup>196</sup> See also Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059, 1075 (2004) (suggesting that federal courts are limited in their judicial decisionmaking by institutional considerations such as their “limited fact-finding capacity, their weak democratic pedigree, their limited legitimacy, and their likely ineffectiveness as frequent instigators of social reform”). Federalism is, of course, a constitutional concern itself. Government actors often have to balance competing rights and interests, and agencies are no exception.

<sup>197</sup> Sager, *supra* note 191, at 1227.

<sup>198</sup> *Id.*

<sup>199</sup> See Metzger, *supra* note 18, at 1927 (arguing that “administrative constitutionalism” is premised on a concept of constitutional interpretation in which judicial decisions do not limit other governmental actors from playing a role in constitutional development); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1225 (2006) (“[W]hen institutional or other factors inhibit robust judicial enforcement of a particular constitutional provision, it falls to the executive (and legislative) branch to enforce the provision more fully.”).

<sup>200</sup> See *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267–68 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996).

<sup>201</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

review for sexual orientation classifications has been entrenched by the law of the circuit doctrine.<sup>202</sup> Similarly, in holding in *Brown* that gender identity is not a suspect classification, the Tenth Circuit conceded it was relying on a precedent that was potentially outdated due to evolving scientific understandings, and indicated that reevaluation of the rule may be needed.<sup>203</sup> But no such reevaluation has taken place, and under the principle of stare decisis, *Brown* is still cited to this day.<sup>204</sup> The *Ambris* court was confronted with a case of clear-cut animus; heightening scrutiny should not have been necessary to find that the plaintiff had stated an equal protection claim.<sup>205</sup> But instead the plaintiff lost through the court's formalistic application of the *McDonnell-Douglas* burden-shifting framework.<sup>206</sup> And in *White*, the court agreed that an equal protection violation had indeed occurred.<sup>207</sup> Yet the plaintiff could not recover because of qualified immunity.<sup>208</sup>

My point is not that these cases were, necessarily, wrongly decided. There are good reasons for doctrines such as law of the circuit, stare decisis, burden-shifting, and qualified immunity. But these doctrines have *nothing* to do with the content of equal protection; they are instead grounded in institutional considerations. The law of the circuit doctrine is intended to foster "intracircuit accord," thereby achieving "more effective judicial administration" and promoting "finality of decision."<sup>209</sup> Stare decisis is justified by a desire for "con-

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<sup>202</sup> See *Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015).

<sup>203</sup> See *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995).

<sup>204</sup> See, e.g., *Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015) (citing *Brown* for the proposition that the Tenth Circuit "has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims"); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222, 1227–28 (10th Cir. 2007) (citing *Brown* for its holding that a transsexual plaintiff was not a protected class member); *Qz'etax v. Ortiz*, 170 F. App'x 551, 553 (10th Cir. 2006) (citing *Brown* to support the claim that equal protection claims which "do not involve a fundamental right or suspect classification" do not receive heightened scrutiny).

<sup>205</sup> See *supra* notes 118–19 and accompanying text (discussing the *Ambris* case).

<sup>206</sup> See *Ambris v. City of Cleveland*, No. 1:12CV774, 2012 WL 5874367, at \*5 (N.D. Ohio Nov. 19, 2012) (stating that *Ambris* could not establish a prima facie case of discrimination because she could not demonstrate that she was a member of a protected class under Title VII).

<sup>207</sup> See *White v. City of New York*, 206 F. Supp. 3d 920, 932–34 (S.D.N.Y. 2016) (declaring that the plaintiff leveled "allegations [which] are sufficient to state a plausible claim of discriminatory intent" but holding that the individual police officer defendants are entitled to qualified immunity "because it was objectively reasonable . . . to believe that their actions were lawful").

<sup>208</sup> *Id.* at 934 ("[B]ecause it was objectively reasonable for Officers Garcia and Ureiba and Lt. Cautter to believe that their actions were lawful they are entitled to qualified immunity.").

<sup>209</sup> Dragich, *supra* note 83, at 564–66.

tinuity in [the] law” and the “need to satisfy reasonable expectations.”<sup>210</sup> The burden-shifting framework is employed by courts for reasons of administrability—it is a “sensible, orderly way to evaluate the evidence.”<sup>211</sup> And qualified immunity stems from a concern that permitting suits against government actors “can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.”<sup>212</sup> These doctrines, in and of themselves, tell us nothing about what equal protection means, or should mean.

What’s more—each of these doctrines has worked to the particular detriment of LGBT plaintiffs. Stare decisis and law of the circuit, which enforce consistency by slowing the pace of change, are in tension with assertions of LGBT rights insofar as such rights are based on rapidly changing scientific, social, or constitutional understandings.<sup>213</sup> The *McDonnell-Douglas* burden-shifting framework, when used to define the scope of equal protection in government employment cases, inherently disadvantages LGBT plaintiffs because Title VII does not expressly protect people from sexual orientation or gender

<sup>210</sup> *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

<sup>211</sup> See *Patterson v. McLean Credit Union*, 491 U.S. 164, 215–16 (1989) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008).

<sup>212</sup> See *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

<sup>213</sup> See Amy Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1018 n.22 (2003) (collecting cases in which the law of the circuit doctrine (or “no panel overruling” rule) is treated as “a variant of stare decisis”); Bryan T. Camp, *Bound by the BAP: The Stare Decisis Effects of BAP Decisions*, 34 SAN DIEGO L. REV. 1643, 1665–66 (1997) (“[A]pplication of the [stare decisis] rule slows the rate at which decisions can change over time and thus promotes stability.”). For background regarding these rapidly changing understandings, see Bradford J. Kelley, *The Rainbow Sea Change: The Impact of Popular Culture on Homosexual Rights*, 16 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 283, 285 (2014) (noting “[t]he vast and rapid changes in the law regarding the treatment of homosexuals” and a “cultural sea change in gay rights”); Susan Page, *Poll: Attitudes Toward Gays Changing Fast*, USA TODAY (Dec. 5, 2012), <https://www.usatoday.com/story/news/politics/2012/12/05/poll-from-gay-marriage-to-adoption-attitudes-changing-fast/1748873/> (noting “dramatic changes in recent years in attitudes on issues ranging from permitting gay men and lesbians to serve openly in the military to allowing them to marry”); Susan Hazeldean, *Confounding Identities: The Paradox of LGBT Children Under Asylum Law*, 45 U.C. DAVIS L. REV. 373, 377 (2011) (“Asylum law was initially ahead of constitutional jurisprudence in recognizing gay men as a persecuted minority in need of protection, but it has failed to keep pace with evolving understandings of sexual identity and the rights of LGBT young people.”); Stacey L. Sobel, *Culture Shifting at Warp Speed: How the Law, Public Engagement, and Will & Grace Led to Social Change for LGBT People*, 89 ST. JOHN’S L. REV. 143, 147 (noting “the relatively quick pace of legal change for sexual minorities in the United States”); M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943 (2015) (discussing evolutions in scientific understandings of sex and arguing that the law should be updated to reflect these evolutions).

identity discrimination.<sup>214</sup> And the lack of clarity in the Court's gay rights jurisprudence has lent itself to robust applications of qualified immunity doctrine, leading at least one commentator to ask: "Are Gay Rights Clearly Established?"<sup>215</sup>

Underenforcement of constitutional norms in the judiciary due to institutional concerns helps justify agencies' robust enforcement of individual rights. Agencies cannot shirk their constitutional commitments "merely because the federal judiciary is unable to enforce these norms at their margins."<sup>216</sup> Indeed sometimes—as in the prison context—certain violations of constitutional norms may be left almost entirely unremedied if not for intervention by constitutional actors in the legislative and executive branches.<sup>217</sup>

One might object that this could result in intrajurisdictional disuniformity between courts and agencies. That is, courts and agencies may end up taking positions that are inconsistent with each other, resulting in uncertainty and conflict in the law. But this need not be considered a vice. As Bertrall Ross explains, when "two sets of constitutional applications co-exist, a process of constitutional experimentation can occur."<sup>218</sup> This experimentation "provides the People with the chance to learn how well different applications advance the relevant constitutional principles, to engage in informed dialogue about the applications, and to pressure courts and agencies to adopt applications best suited for particular societal contexts."<sup>219</sup> In the same jurisdiction that subjects gender identity classifications to rational basis review, the local EEOC office might rule that an employer's dismissal of a transgender employee violates Title VII.<sup>220</sup> In this way, the public

<sup>214</sup> See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (stating that transgender persons are not a protected class under Title VII); *Ambris v. City of Cleveland*, No. 1:12CV774, 2012 WL 5874367, at \*5 (N.D. Ohio Nov. 19, 2012) (stating that sexual orientation is not a protected classification under Title VII).

<sup>215</sup> See *Wagner*, *supra* note 119, at 869–70 (noting inconsistencies between courts of different jurisdictions in holding that the unconstitutionality of discrimination based on sexual orientation is "clearly established" for purposes of granting qualified immunity). For discussion of the lack of clarity in the Supreme Court's gay rights jurisprudence, see *supra* Section I.B.

<sup>216</sup> *Sager*, *supra* note 191, at 1227.

<sup>217</sup> See *Turner v. Safley*, 482 U.S. 78, 84 (1987) (stating that "courts are ill equipped to deal with the . . . problems of prison administration and reform" (quoting *Procurier v. Martinez*, 416 U.S. 396, 405 (1974))), *superseded by statute*, 42 U.S.C. § 2000cc-1 (2012).

<sup>218</sup> Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 525 (2015).

<sup>219</sup> *Id.* at 556.

<sup>220</sup> Contrasting applications are not necessarily conflicting applications. There is no direct conflict, for example, between a court subjecting gender identity classifications to rational basis review and the EEOC finding transgender discrimination prohibited by Title VII. But where agency and judicial interpretations *do* conflict, principles of judicial

can compare the consequences of contrasting applications of equal protection and thereby influence the future decisions of constitutional actors.

### B. *Agencies and Backlash*

The history of LGBT rights in the United States is one marked by periods of rapid change and backlash. This backlash has, in significant ways, contributed to the systematic underenforcement of equality norms. When the Dade County Commission enacted a law in 1977 prohibiting sexual orientation discrimination in public employment, for example, Anita Bryant waged a successful campaign to repeal the law and then expanded her efforts, working to oppose gay rights across the country.<sup>221</sup> When the Supreme Court of Hawaii held that a state provision barring same-sex marriage was subject to strict scrutiny review,<sup>222</sup> Congress responded by passing the Defense of Marriage Act,<sup>223</sup> which limited the federal definition of marriage to unions between one man and one woman.<sup>224</sup>

Today we are in the midst of another backlash. When the City of Houston passed a broad antidiscrimination ordinance that included among its provisions protections for transgender persons, opponents launched a vicious repeal campaign.<sup>225</sup> This campaign, largely predicated on the argument that the ordinance would allow men to enter women's bathrooms and assault them, ultimately led to the ordinance's repeal.<sup>226</sup> But the backlash did not stop there. In the wake of the Houston referendum, other so-called "bathroom bills"<sup>227</sup> were

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supremacy would presumably apply. *See, e.g.,* *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 703 (7th Cir. 2016) ("Whatever deference we might owe to the EEOC's adjudications, we conclude . . . , that Title VII, as it stands, does not reach discrimination based on sexual orientation."), *aff'd on reh'g*, 853 F.3d 339 (7th Cir. 2017). State courts contribute to constitutional experimentation as well—but this is beyond the scope of this Note.

<sup>221</sup> *See* Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 *LAW & INEQ.* 117, 124–26 (2012).

<sup>222</sup> *See* *Baehr v. Lewin*, 852 P.2d 44, 47–48 (Haw. 1993).

<sup>223</sup> *See* H.R. REP. NO. 104-664, at 6–7 (1996) ("H.R. 3936 is inspired, again, not by the effect of *Baehr v. Lewin* inside Hawaii, but rather by the implications that lawsuit threatens to have on the other States and on federal law.").

<sup>224</sup> *See* Defense of Marriage Act, Pub. L. No. 104-199, 1996 U.S.C.C.A.N. (110 Stat.) 2419, *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>225</sup> *See* Manny Fernandez & Alan Blinder, *Opponents of Houston Rights Measure Focused on Bathrooms, and Won*, *N.Y. TIMES* (Nov. 4, 2015), [https://www.nytimes.com/2015/11/05/us/houston-anti-discrimination-bathroom-ordinance.html?\\_r=0](https://www.nytimes.com/2015/11/05/us/houston-anti-discrimination-bathroom-ordinance.html?_r=0). The opposition was led by a "largely local conservative coalition" which included the pastor of one of Houston's biggest churches and Lieutenant Governor Dan Patrick. *See id.*

<sup>226</sup> *See id.*

<sup>227</sup> As the Gay & Lesbian Alliance Against Defamation (GLAAD) explains, "bathroom bill" is a term used to negatively portray nondiscrimination laws, and "incite fear and panic at the thought of encountering transgender people in public restrooms." *See* *GLAAD*



proposed across the country—including North Carolina’s infamous HB2, formally known as “An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations.”<sup>228</sup>

HB2 was enacted only months after the repeal of the Houston ordinance, in response to a similar ordinance passed by the city of Charlotte.<sup>229</sup> The law prohibited individuals from using public bathrooms not corresponding to their “biological sex,” which was supposedly indicated by individuals’ birth certificates.<sup>230</sup> HB2 had a broad scope, but perhaps the most perilous element of the law was its effect on transgender students. As the *Charlotte Observer* reported: “Under HB2, North Carolina now requires students to use public school restrooms and locker rooms based on the gender on their birth certificates.”<sup>231</sup> This was a decision with grave consequences. As the World Professional Association for Transgender Health explained in a brief filed in the *G.G.* case:

[T]ransgender children often become distressed by the approach or onset of puberty. . . . The impending development of irreversible secondary-sex characteristics of the wrong sex can cause transgender adolescents tremendous psychological pain, often leading to depression, anorexia, social phobias, and suicidality. . . . According to the established medical consensus, the only effective treatment for the disabling experience of gender dysphoria is the provision of medical and social support for gender transition and, thus, the affirmation of the individual’s gender identity.<sup>232</sup>

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*Media Reference Guide*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited Aug. 31, 2017).

<sup>228</sup> 2016 N.C. Sess. Laws 3; see also Tal Kopan & Eugene Scott, *North Carolina Governor Signs Controversial Transgender Bill*, CNN (Mar. 24, 2016), <http://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/>.

<sup>229</sup> See *id.* On March 30, 2017, newly-elected Governor of North Carolina Roy Cooper signed into a law a compromise bill that repealed HB2, but put into place “a moratorium on local ordinances regulating public accommodations or private employment practices until Dec. 1, 2020.” Craig Jarvis & Colin Campbell, *HB2 Off the Books as Gov. Roy Cooper Signs Compromise Into Law*, CHARLOTTE OBSERVER (Mar. 30, 2017, 10:12 AM), <http://www.charlotteobserver.com/news/politics-government/article141658044.html>.

<sup>230</sup> See 2016 N.C. Sess. Laws 3 (stating that “biological sex” is “[t]he physical condition of being male or female, which is stated on a person’s birth certificate” and restricting bathroom access based on this definition of biological sex); Michael Gordon et al., *Understanding HB2: North Carolina’s Newest Law Solidifies State’s Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 26, 2016, 11:00 AM), <http://www.charlotteobserver.com/news/politics-government/article68401147.html>.

<sup>231</sup> *Id.*

<sup>232</sup> WPATH Brief, *supra* note 110, at 15–17.

It is against this backdrop that we can now fully contextualize the DOE's Title IX guidance.<sup>233</sup> Though conservatives complained of government "overreach" and "bullying,"<sup>234</sup> the guidance is best understood not as a provocation, but as a response. The DOE had been studying the issue of transgender individuals' access to facilities for years, but pressure to act mounted in the spring of 2016.<sup>235</sup> Little more than a week after enactment of HB2, national leaders of the LGBT rights movement lobbied the White House for action in a hastily assembled meeting.<sup>236</sup> This lobbying was a direct response to HB2 and similar bills that were popping up across the country.<sup>237</sup> Indeed, the ACLU warned that "[t]ransgender students are under attack," and entreated that "[w]ith such a bright spotlight on the series of attacks on transgender people's rights, comprehensive federal guidance will make a huge difference for a whole generation."<sup>238</sup> It was in this context that the DOE issued its guidance—it was acting to safeguard the rights of transgender students amidst a majoritarian backlash that was manifesting in a growing array of anti-LGBT legislation.<sup>239</sup>

As a general matter, agencies should be well positioned to mitigate majoritarian backlash. While elected officials face constant pressure from constituents to give in to majoritarian preferences,<sup>240</sup>

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<sup>233</sup> DOE Guidance, *supra* note 150.

<sup>234</sup> Jack Healy & Richard Pérez-Peña, *Solace and Fury as Schools React to Transgender Policy*, N.Y. TIMES (May 13, 2016), <https://www.nytimes.com/2016/05/14/us/transgender-bathrooms.html>.

<sup>235</sup> See Sheryl Gay Stolberg et al., *How the Push to Advance Bathroom Rights for Transgender Americans Reached the White House*, N.Y. TIMES (May 21, 2016), <https://www.nytimes.com/2016/05/22/us/transgender-bathroom-obama-schools.html>.

<sup>236</sup> *See id.*

<sup>237</sup> *See id.*

<sup>238</sup> ACLU, *Transgender Students Need Protection*, ACLU (emphasis omitted), <https://action.aclu.org/secure/transgender-students-need-protections> (last visited Feb. 4, 2017).

<sup>239</sup> *See e.g.*, Jennifer Bendery & Michelangelo Signorile, *Everything You Need to Know About the Wave of 100+ Anti-LGBT Bills Pending in States*, HUFFINGTON POST, [http://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination\\_us\\_570ff4f2e4b0060ccda2a7a9](http://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination_us_570ff4f2e4b0060ccda2a7a9) (last updated Sept. 23, 2016) (detailing state measures to curb LGBT rights in early 2016). Polling in May 2016 showed that a plurality of Americans supported policies requiring transgender individuals to use bathrooms corresponding to their sex assigned at birth. *See* Justin McCarthy, *Americans Split Over New LGBT Protections, Restroom Policies*, GALLUP (May 18, 2017) <http://www.gallup.com/poll/210887/americans-split-new-lgbt-protections-restroom-policies.aspx> (finding that in May 2016, 50 percent of Americans supported such policies, versus 40 percent who supported allowing transgender individuals to use bathrooms corresponding with their gender identity).

<sup>240</sup> *See* Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 54 (2008) ("Elected politicians . . . tend to respond to majoritarian interests . . .").

agencies are more insulated from political pressures.<sup>241</sup> While the desirability of such insulation is the subject of much debate,<sup>242</sup> diminished accountability may well be a virtue in the context of majoritarian backlash, insofar as such backlash threatens the rights of an unpopular group.<sup>243</sup> Moreover, while commentators decry the “inertia and torpor” of bureaucracies,<sup>244</sup> agencies can be far more responsive to backlash than can the judiciary, the branch we normally conceive of as countering majoritarian impulses. Litigation can take years to wind its way through the court system to a final resolution. The complaint in the *G.G.* case was filed on June 11, 2015;<sup>245</sup> as of this writing, the case was on remand to the district court for consideration of whether the case has become moot on account of Grimm’s graduation from high school.<sup>246</sup> In contrast, the DOE’s guidance was released at the very height of the debate over transgender individuals’ access to facilities, highlighting its responsiveness to infringements of constitutional norms.

Perhaps, then, the opposite objection could be made—the DOE moved *too* quickly. The agency should not have short-circuited a vigorous debate playing out in the public sphere, this objection goes. But this concern is misplaced. Unlike a regulation promulgated through notice and comment procedures, a guidance document does not have the force of law—it might influence the debate but it cannot cut it off.<sup>247</sup> In this way the DOE’s letter is better understood as policing equal protection through persuasion, not through coercion. This is

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<sup>241</sup> See *id.* at 55 (referring to the bureaucracy as “partially insulated” and “politically unresponsive”).

<sup>242</sup> It is a matter of contention, for example, whether political insulation is countermajoritarian and thus undesirable, or whether it in fact enhances democratic legitimacy by reducing variance in policy outcomes. See *id.* at 54–55.

<sup>243</sup> Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, 153 n.4 (1938) (noting that prejudice may “curtail the operation of those political processes ordinarily to be relied upon to protect minorities”).

<sup>244</sup> E.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2263 (2001).

<sup>245</sup> See Complaint, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-00054-RGD-TEM (E.D. Va. June 11, 2015). For discussion of the *G.G.* case, see *supra* Section II.B.

<sup>246</sup> See *Grimm v. Gloucester Cty. Sch. Bd.*, 869 F.3d 286, 290–91 (4th Cir. 2017).

<sup>247</sup> See *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (stating that opinion letters, policy statements, agency manuals, and enforcement guidelines “lack the force of law”). Note, however, that agency guidance may technically be entitled to *Auer* deference. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (stating that an agency’s interpretation of its own regulations is entitled to deference unless it is “plainly erroneous or inconsistent with the regulation” (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989))). This does not mean, however, that agencies have free reign to make binding law on constitutional questions. Bertrall Ross notes that when agencies engage in administrative constitutionalism, “the Court has tended to refuse to apply heightened deference to the agency’s interpretation of the statute.” Ross, *supra* note 14, at 228.

similar to the EEOC's issuance of guidelines in the 1970s expressing the Commission's position that pregnancy discrimination is sex discrimination, and thus violates Title VII.<sup>248</sup> Though the EEOC guidelines did not have the force of law, civil rights litigators relied on these guidelines in their constitutional litigation, and the guidelines were the basis for Congress's 1978 legislation prohibiting pregnancy discrimination in employment.<sup>249</sup> Thus, agencies issuing guidance might more fairly be conceived of as contributors to a cross-institutional debate in their capacity as constitutional actors, not as entities acting unilaterally to cut off that debate.

### C. *On the Slippery Slope*

Underenforcement of constitutional equality norms may also be driven by slippery slope rhetoric, which has long been a mainstay of debates over LGBT rights. Years before opponents of the Houston ordinance claimed that protecting transgender people from discrimination would lead to assaults in public restrooms, groups in Colorado claimed that anti-discrimination ordinances protecting gay people would lead to affirmative action.<sup>250</sup> Conservative judges, too, have embraced slippery slope rhetoric, the paradigmatic example being Justice Scalia's *Lawrence* dissent, in which he predicted that the Court's overruling of *Bowers* might one day lead to marriage equality.<sup>251</sup> Slippery slope arguments are not entirely baseless. Professor Eskridge observes that "the Equal Protection Clause alone offers a minority group a potential constitutional jackpot at the wholesale level, that is, in challenges to an array of interconnected discriminations in state benefits as well as burdens."<sup>252</sup> It is in this way that slippery slope fears can drive courts to underenforce LGBT rights: reluctance to provide a "constitutional jackpot" to a minority group can motivate constitutional decisions in specific contexts.

But agency action is less prone to slippery slope rhetoric. Agency action is discrete: change occurs one domain at a time. While agencies do borrow ideas from each other,<sup>253</sup> they are attuned to their unique regulatory domains—change, in other words, does not occur at the

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<sup>248</sup> See ESKRIDGE & FEREJOHN, *supra* note 20, at 30–31.

<sup>249</sup> See *id.* at 31.

<sup>250</sup> See Kreis, *supra* note 221, at 130–35 (discussing the history of Colorado's Amendment 2).

<sup>251</sup> See *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting).

<sup>252</sup> William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1216 (2000).

<sup>253</sup> HHS, for example, in its ACA regulation, said that its approach "accords with well-accepted legal interpretations adopted by other Federal agencies," and referred to the DOE's Title IX regulation in particular. See, e.g., *Nondiscrimination in Health Programs*

“wholesale level.” Consider, for example, the difference in approach taken by HUD’s Equal Access Rule and the DOJ’s regulations implementing the Prison Rape Elimination Act (PREA). Under the Equal Access Rule, homeless shelters receiving funding through HUD’s Office of Community Planning and Development are required to place transgender clients in accordance with their gender identity.<sup>254</sup> The DOJ’s PREA regulation, by comparison, does not go this far. In the context of federal prisons, the regulation states that:

[A]n agency may not simply assign the inmate to a facility based on genital status. Rather, the agency must consider on a case-by-case basis whether a placement would ensure the inmate’s health and safety, and whether the placement would present management or security problems, giving serious consideration to the inmate’s own views regarding his or her own safety.<sup>255</sup>

Whether this scaled back approach is desirable is open to debate. But what is clear is that the differing approaches taken by HUD and the DOJ demonstrate how agency action is context specific and thus may avoid the supposed reverberations of a broad anti-discrimination statute or pathbreaking equal protection decision as suggested by slippery slope rhetoric.

#### D. *Resisting Rollback*

A critique of administrative constitutionalism is that the gains made through agency action under one administration are liable to be rolled back by subsequent administrations. This point is well taken, and I do not mean to suggest that agency action is preferable to, or a replacement for, judicial or legislative enforcement of equal protection. But certain considerations both intrinsic and extrinsic to the administrative state may limit the scope and effect of such a rollback.

Rollback may be impeded by the leadership structure of an agency—independent agencies like the EEOC are led by board members with staggered terms, which might slow agency change in response to a change in administration.<sup>256</sup> And while guidance may be easier to roll back, legislative rules can only be repealed through

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and Activities, 81 Fed. Reg. 31,376, 31,388–89 (May 18, 2016) (codified at 45 C.F.R. pt. 92 (2016)).

<sup>254</sup> Equal Access Rule, *supra* note 181, at 64,763.

<sup>255</sup> National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106, 37,110 (June 20, 2012) (codified at 28 C.F.R. pt. 115 (2012)).

<sup>256</sup> See Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 259–60 (explaining that staggered terms is one characteristic making agencies more independent from the President).

notice and comment procedures.<sup>257</sup> Moreover, such a repeal would be subject to judicial review.<sup>258</sup> And agency policymaking is accomplished largely through the actions of career civil servants who are dedicated to the agency's mission, and who tend to resist agency actions conflicting with that mission.<sup>259</sup> Moreover, Ross notes that "even if agency heads are initially appointed to carry out the directives of the President or Congress, as they 'acquire additional expertise in the relevant policy arena, they often adopt the preferences and perspectives of agency careerists on policy issues'"<sup>260</sup>—known in the literature as "going native."<sup>261</sup>

Factors extrinsic to agencies help resist rollback as well. First, decisions made in agency adjudications are sometimes entrenched by the courts. One court, for example, said that "[t]he EEOC's decisions should be deferred to when persuasive," and cited *Macy v. Holder* to support its holding that anti-transgender discrimination is discrimination because of sex.<sup>262</sup> And, critically, implementation of a rule—even if only for a short time—exposes the public to the effect of such a rule and may thereby dispel irrational fears. In 2009, forty-nine percent of troops said that lesbian, gay, and bisexual individuals should not be allowed to serve.<sup>263</sup> This number plummeted to only nineteen percent by 2014.<sup>264</sup> Certainly there are multiple causes of this massive shift, but one reason surely is the repeal of "Don't Ask, Don't Tell" in 2011.<sup>265</sup> Implementation of the repeal dispelled the once-widespread fear that allowing gay service members to serve openly would harm

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<sup>257</sup> See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) (stating that the APA mandates "that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance").

<sup>258</sup> See 5 U.S.C. § 702 (2012) (providing for judicial review of agency actions under the APA when a person suffers a legal wrong as a result of such action).

<sup>259</sup> See Ross, *supra* note 218, at 574. Ross explains that career civil servants do "most of the heavy lifting" in the policy-making process. See *id.* Thus, when agency actions motivated by politics are in disaccord with the agency's core mission, career civil servants "will often resist them in favor of actions that advance the agency's mission." See *id.*

<sup>260</sup> *Id.* (quoting David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 *YALE J. ON REG.* 407, 431 (1997)).

<sup>261</sup> See Spence, *supra* note 260, at 431.

<sup>262</sup> See *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 & n.103 (2016) (citing *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*11 (E.E.O.C. Apr. 20, 2012)).

<sup>263</sup> See *America's Military: A Conservative Institution's Uneasy Cultural Revolution*, *MILITARY TIMES* (Dec. 21, 2014), <https://goo.gl/EOkclA>.

<sup>264</sup> See *id.*

<sup>265</sup> On July 22, 2011, President Obama formally announced the repeal of Don't Ask, Don't Tell. See Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, *N.Y. TIMES* (July 22, 2011), <http://www.nytimes.com/2011/07/23/us/23military.html>.

military readiness<sup>266</sup>—indeed, a 2012 poll found that only 4.5% of active duty service members said their unit was negatively impacted by the repeal, and a study found that service members reported approximately the same level of military readiness both pre- and post-repeal.<sup>267</sup>

Yet it is worth repeating that there is merit to the rollback critique—the factors surveyed in this subsection may limit the scope and extent of rollback, but they are not foolproof. Elections have consequences, and a guidance document is no replacement for judicial or legislative action. Indeed, the Trump administration moved quickly to roll back the Department of Education’s guidance on transgender students.<sup>268</sup> But this also illustrates that certain forms of agency action are more enduring and thus better suited for promoting constitutional rights—note that the HHS and HUD rules protecting transgender individuals, which were promulgated pursuant to formal notice and comment procedures, still remain in force.

Agency actions, though an imperfect mechanism for rights enforcement, play an important role in policing constitutional equality norms where they are underenforced by the judiciary and legislatures. Agencies should not hesitate to fully enforce these norms when other constitutional actors have failed to do so for reasons not relating to the content of equal protection—be it institutional concerns, majoritarian backlash, or fears of a slippery slope. And, where possible, they should opt for forms of agency action that are more enduring—like notice and comment rulemaking.

## CONCLUSION

Staff Sergeant Patricia King served three tours of duty as an infantryman in the Army, working across the mountains of Afghanistan and in the streets of Kabul.<sup>269</sup> She excelled at her job,

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<sup>266</sup> See Aaron Belkin et al., *Readiness and DADT Repeal: Has the New Policy of Open Service Undermined the Military?*, 39 ARMED FORCES & SOC’Y 587, 588 (2012) (noting that “1,167 retired generals and admirals released a statement claiming that DADT repeal ‘would undermine recruiting and retention, impact leadership at all levels . . . and eventually break the All-Volunteer Force’”).

<sup>267</sup> See *id.* at 590.

<sup>268</sup> See Dear Colleague Letter from Sandra Battle, Acting Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., and T.E. Wheeler, II, Acting Assistant Attorney Gen. for Civil Rights, U.S. Dep’t of Justice (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>; see also Sandhya Somashekhar et al., *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), <https://goo.gl/N0N14j>.

<sup>269</sup> See Will Heilpern, *Meet the First Openly Transgender Infantryman in the US Army*, BUS. INSIDER (June 27, 2016, 12:22 PM), <http://www.businessinsider.com/tricia-king-the-first-transgender-infantryman-in-the-us-army-2016-6>.

rising to become a squad leader.<sup>270</sup> But something was wrong. “I could no longer ignore who I was,” King said, “I had to take a risk and live an authentic life and take a chance for true happiness.”<sup>271</sup> And so in June 2015, Staff Sergeant King came out, becoming the first openly transgender person to serve in the United States Army.<sup>272</sup>

King was well aware of the risks she was taking on. At the time, being openly transgender was still grounds for discharge.<sup>273</sup> But in a June 2016 interview she expressed optimism about her future in the military. “I am anxious and I am excited for the day when the Secretary of Defense announces that ‘Yes, of course you can serve openly,’” she said.<sup>274</sup> “As a soldier, I would like to believe in my chain of command, as they have believed in me.”<sup>275</sup> Little did King know that only three days later, Secretary of Defense Carter would do exactly that, announcing that transgender people could serve openly in the military, thus closing a chapter that had started with Jane Doe’s categorical exclusion from Army service some forty years earlier.<sup>276</sup>

And then came Trump. On July 26, 2017, President Trump announced that “the United States Government will not accept or allow”<sup>277</sup> “[t]ransgender individuals to serve in any capacity in the U.S. Military.”<sup>278</sup> This painful step backwards is a reminder of the fragility of a regime of equal protection grounded in administrative actions, as opposed to legislation or judicial decisions. This is not, of course, to diminish the important work that agencies have done in advancing LGBT equality. When agencies took action to fight employment discrimination based on sexual orientation, or to protect transgender clients in homeless shelters, it made a real difference in people’s lives. But although administrative constitutionalism has at

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<sup>270</sup> See *id.*

<sup>271</sup> *Id.*

<sup>272</sup> See *id.*

<sup>273</sup> See *id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> See Carter, Press Briefing, *supra* note 11.

<sup>277</sup> Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864>.

<sup>278</sup> Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472>. On October 30, 2017, Judge Colleen Kollar-Kotelly of the District Court for the District of Columbia issued a preliminary injunction blocking the administration’s transgender military ban. See Justin Jouvenal, *Federal Judge in D.C. Blocks Part of Trump’s Transgender Military Ban*, WASH. POST (Oct. 30, 2017), [https://www.washingtonpost.com/local/public-safety/federal-judge-in-dc-blocks-part-of-trumps-transgender-military-ban/2017/10/30/41d41526-bd94-11e7-959c-fe2b598d8c00\\_story.html](https://www.washingtonpost.com/local/public-safety/federal-judge-in-dc-blocks-part-of-trumps-transgender-military-ban/2017/10/30/41d41526-bd94-11e7-959c-fe2b598d8c00_story.html). This is another example of entrenchment of an agency decision by the courts.



times been a critical tool for securing LGBT equality, it is a tool with great limitations.

It goes without saying that society's attitudes regarding sexual orientation and gender identity have changed radically since the days of *Doe v. Alexander*.<sup>279</sup> In 2017, some of the most oppressive barriers to equality—such as the Defense of Marriage Act and “Don’t Ask, Don’t Tell”—have fallen. But there are many more fights ahead: about discrimination in the workplace, about the rights of students, about public accommodations, about religious freedom. Some of these battles will play out in the courts and some in the statehouses and Congress. But others will take place within the administrative state—among the administrators and civil servants staffing the agencies that make modern life possible. It is for this reason that we must work to fully understand and theorize the processes by which constitutionalism enters agency decisionmaking, producing the universe of guidance, regulations, and administrative decisions that may contain no reference whatsoever to “Equal Protection,” yet still work to fulfill its promise.

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<sup>279</sup> 510 F. Supp. 900 (D. Minn. 1981).